TONG PENG HONG v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) September 16, 1955]

[Ipoh — Criminal Appeal No. 62 of 1955]

Dangerous Drugs Ordinance, 1952, ss. 6 and 37(d) — Possession of raw opium — Statutory inference — Presumption under s. 37(d) of the Ordinance — When applicable.

The appellant in this case was the owner of a motor lorry, of which the 2nd accused in the case was the driver and the 3rd accused the attendant. On February 12, 1955, the lorry was stopped by Customs Officers on the main road just outside Teluk Anson. At the time the lorry was stopped the driver and the appellant were sitting in front of the lorry in the driver's cabin. The seat in the cabin consisted of a sort of wooden box divided into two compartments the top of which has a hinged lid upon which the occupants sit. The driver and the appellant were sitting on top of this box, the attendant was in the rear. In the box which was not locked in the compartment immediately under where the appellant was sitting was found a small leather bag. In this bag under some worn-out personal clothing were found four slabs of raw opium. The prosecution relied on the presumption under s. 37(d) of the Dangerous Drugs Ordinance.

The learned President held that the statutory presumption arose against the appellant and the driver but not against the attendant. After hearing the evidence for the defence, he acquitted the driver and convicted the appellant. From his grounds of judgment, it was clear that the learned President convicted the appellant because he held that the presumption contained in s. 37(d) of the Ordinance operated against him, as he held that the lorry came within the words "anything whatsoever containing" the opium.

Held: (1) a vehicle in which a drug is being carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drug" and therefore in such a case the presumption contained in s. 37(d) of the Dangerous Drugs Ordinance does not arise; (2) as in this case the learned President had made it clear that apart from the presumption he would not have convicted, the conviction could not stand and must be set aside.

Cases referred to:—

(1) *Saminathan v. Public Prosecutor* (1955) M.L.J. 121.

(2) *Dhulipala Kameswara Rao v. Wyles* (1949) 2 All E.R. 685, 686, 687.

MAGISTRATE'S CRIMINAL APPEAL.

Yeoh Ah Seng for the appellant.

A. P. Jack (Federal Counsel) for the respondent.

Thomson J.: — This is an appeal from the Sessions Court at Teluk Anson.

The appellant and one Cheah Poh Heng (whom I shall call 'the driver') and one Heng Mooi Khooi (whom I shall call 'the lorry attendant') were charged that they "did jointly have in your possession" about 8½ lbs of raw opium in contravention of section 6 of the Dangerous Drugs Ordinance. In the event, the driver and the lorry attendant were acquitted. The appellant was convicted and fined $2,500. Against that conviction and sentence he has now appealed.

The material facts of the case were at no time seriously in dispute.

The appellant is the owner of a motor lorry No. AA9061 of which at the material time the second accused was the driver and the third accused the attendant. This lorry has a locally made body of a type that is very common in this country. The seat in the cab consists of a sort of wooden box divided into two compartments the top of which has a hinged lid upon which the occupants sit.

On 13th February, 1955, on the main road just outside Teluk Anson this lorry was stopped and searched by Customs Officers. At the time the lorry was stopped the driver and the appellant were in the cab sitting on top of the box which has been described. The attendant was in the rear. In the box, which was not locked, in the compartment immediately under where the appellant was sitting was found a small leather bag of the type generally described as a grip which was closed with what is generally called a zip fastener but not locked. In this bag, under some pieces of worn-out personal clothing, were found four slabs of raw opium weighing about 8½ lbs which is no doubt worth a great deal of money.

At the close of the Prosecution case it was submitted for the defence that there was no case to answer. In reply, the Prosecuting Officer stated that he relied on section 37(d) of the Ordinance which reads as follows:—

"(d) Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

The learned President was of the opinion, although he has given no reason for it, that the words "anything whatsoever" included the motor lorry. He went on to hold that on that basis the statutory presumption arose against the appellant and the driver but not against the attendant. He accordingly dismissed the summons as against the attendant and called upon the appellant and the driver to make their defence. In the event, after hearing the evidence for the defence, he changed his mind as to the presumption arising against the driver and acquitted him. He found, however, that the appellant had failed to rebut the presumption and he accordingly convicted him.

I do not think I am concerned here with the grounds on which the learned President differentiated between the appellant and the driver. The real point is that it is clear he would not have convicted the

appellant unless he had been of the opinion that the presumption contained in section 37(d) operated against him and that that opinion was based on his finding that the lorry came within the words "anything whatsoever" containing the opium.

After the most careful consideration I have come to the conclusion that the learned President was wrong and I have come to this conclusion for reasons which I shall proceed to state.

In the first place, I think that the interpretation which has been placed upon section 37(d) is unreasonable.

Before proceeding further I would make certain observations of a general nature regarding statutory provisions of this sort which appear to detract from the force of the ordinary rule that in a criminal prosecution the onus lies upon the prosecution to prove every ingredient in the offence charged against the accused person. In this connection, I have read the judgment of my brother Buhagiar in the case of *Saminathan v. Public Prosecutor*[1] and with respect I would express myself as being in agreement with what he says. There is, however, a point relating to these statutory provisions which though it is implicit in that judgment is not expressed in terms. It is this. The object of such provisions is not to create new offences. Nor is it to lead to the conviction of innocent persons. It is to ensure that the Courts should draw from certain facts, once they are proved, the inferences that experience has shewn a reasonable man would normally draw from such facts. Buhagiar J. would seem to have treated such provisions as an indication by the Legislature of the way in which section 106 of the Evidence Ordinance is to be applied in particular cases. With that I do not disagree. But I would emphasize the point that such provisions are in truth statutory directions as to the drawing of inferences. Inferences are matters of reason and it seems to me that if in any particular case such a statutory inference leads to a conclusion which is manifestly unreasonable then it must be held that such a result was not intended by the Legislature and, unless the words of the statute are crystal clear and compelling, any construction which leads to such result must be rejected. Up to a point that may be another way of saying that the quantum of proof on the part of an accused person which is necessary to vitiate the statutory inference will vary according to the circumstances of each individual case. It is to a very large extent a question of degree. Nevertheless, there must be cases where the result produced by the operation of the statutory inference is so unreasonable as to cast doubt upon any construction which leads to it.

Applying these observations to section 37(d) of the Drugs Ordinance, it seems to me that if the words "anything whatsoever" are to be construed literally they may well produce extremely unreasonable results. If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it. But how far is this to go? The learned President has taken it to the extent of saying that where something is found in a handbag which is being carried on a lorry, the owner of which is on it but not driving it, then the owner is to be presumed to know all about the contents of the handbag not because he is in control of the bag but because he is the person having the lorry in his custody or under his control for the time being. But if this be so, what is the position where something is found in a bag which is found in a railway train? Or in the 'Canton' in the Penang roads? Is it to be held, in the absence of proof to the contrary, that the engine driver or the guard of the train or the master of the ship has knowledge of the contents of the bag?

In such cases it seems to me that the presumption does not apply. If there is an available construction which would avoid such unreasonable results it is to be adopted. If there is no such construction available then the Court would be justified in holding that the rebuttal of the presumption lay in the very facts relied upon to set it up.

In the present case, however, it is a matter of construction for the true construction is clearly narrower and more reasonable than that adopted by the learned President.

The words "anything whatsoever" by themselves have as wide a meaning as any words can have but that meaning is governed and greatly restricted by the word "containing". A thing containing another thing is not synonymous with a thing in which that other thing is. To take an extreme example, it is not correct to say the earth contains the fly which at the moment is walking up the wall of my Chambers. Both by derivation and by ordinary usage the word "containing" implies some measure of holding or restriction. The jar contains the jam but the cupboard contains the jar. In short, a container is not something in which another thing is. It is something which surrounds or holds another thing so as to prevent that other thing from being elsewhere.

Applying that consideration to the present case the thing which contained the opium was not the lorry but the handbag to which, of course, by itself the statutory presumption had no application.

Again, it seems to me that section 37(d) is to be read as part of the section as a whole and in particular in the light of paragraph (f) which relates to ships and aircraft, paragraph (g) which relates to premises and paragraph (h) which relates to vehicles. Paragraph (h), in particular, provides that where a drug is found concealed in a specially constructed compartment in a vehicle it shall be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being. I find it impossible to draw any distinction between being in charge of a vehicle and being found to have had a vehicle in custody or under control. Knowledge that a thing is concealed necessarily pre-supposes knowledge of its existence but does not pre-suppose knowledge of its nature. In the circumstances it is impossible to avoid the conclusion that had it been the intention of the Legislature that a vehicle should come within the scope of paragraph (d) then paragraph (h) would not have been enacted because on such a construction of paragraph (d) the bare fact of finding the drug in the vehicle would create an even wider presumption against the person having custody or control than is created by paragraph (h) in the case only where the drug is in a hidden compartment in the vehicle. Or in other words the very absurd result would be reached that there would be a much stronger and wider presumption against the accused in the case where there was no concealment in a specially constructed compartment than in a case in which there was such concealment.

I am thus compelled to the conclusion that a vehicle in which a drug is being carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drug" and that therefore in such a case the presumption contained in section 37(d) does not arise. I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the Court to the conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle. But that is not the case here. The learned President has made it clear that apart from the presumption he would not have convicted and accordingly the conviction cannot stand.

I am fortified to some small extent in the view I have taken by a consideration of the case of *Dhulipala Kameswara Rao v. Wyles*[2]. That case was very different from the present one. The appellant had been convicted for contravening a statutory regulation which requires a person in lawful possession of dangerous drugs to keep them when not in use in a locked receptacle. The appellant had left a quantity of drugs in an unlocked leather bag which he left in a motor car the doors of which were locked. The Divisional Court dismissed the appeal against conviction and Lord Goddard C.J. observed:—

"No one, I think, would call a motor car a receptacle for drugs any more than he would call a house a receptacle for them . . . ."

"I put my judgment entirely on the ground that a motor car cannot be regarded as a receptacle . . . ."

In the present case the conviction is set aside. There will be an Order of acquittal and discharge and the fine, if paid, will be refunded.

Appeal allowed.

PUBLIC PROSECUTOR v. IDRIS

[A. Cr. J. (Thomson J.) September 29, 1955]

[Ipoh — Criminal Appeal No. 57 of 1955]

Criminal Procedure Code (Cap. 6), ss. 173A and 294 — Binding over — Sentence.

The accused in this case was charged with negligent driving and pleaded guilty. The learned Magistrate bound over the accused for six months under s. 294 of the Criminal Procedure Code. Against this order the Public Prosecutor appealed.

Held: s. 294 of the Criminal Procedure Code only applies in the case of an offence punishable with imprisonment and as the offence in this case was punishable with a fine only, the order was wrongly made and must be set aside.

Observations on the difference between binding over under s. 173A and s. 294 of the Criminal Procedure Code.

[Editorial Note: The only provision for binding over in the Singapore Criminal Procedure Code, 1955, is s. 255(3)].

MAGISTRATE'S CRIMINAL APPEAL.

A. P. Jack (Federal Counsel) for the appellant.

Respondent in person.

Thomson J.: — The accused in this case was charged before the Magistrate at Cameron Highlands with negligent driving in contravention of section 4(2) of the Motor Vehicles (Driving Offences) Proclamation. He pleaded guilty. The Magistrate took the view, with which I entirely agree, that the offence was not a serious one and bound the accused over for six months under section 294 of the Criminal Procedure Code. Against that Order the Public Prosecutor appealed.

I set the Order aside because section 294 only applies in the case of an offence punishable with imprisonment and by reason of section 31 of the Proclamation a first offence under section 4(2) is punishable with fine only. In substitution for the Order, I imposed a fine of $5 and ordered that the conviction be endorsed on the accused's driving licence,